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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

RUDOLPH BILDER

Petitioner

vs.

STATE OF OHIO

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE OHIO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

1. Is Section 135.09 of the Akron, Ohio, City Code unconstitutional as applied in this case because it denied Petitioner's Freedoms of Speech and Association and is overbroad in its application?

2. Can name calling be the basis of a criminal violation when said speech is merely an expression and incidental to association?

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Rudolph Bilder, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Ninth District of Ohio Court of Appeals and the Ohio Supreme

Court which refused to declare Akron, Ohio, City Code Section 135.09 as unconstitutional as applied in this case as it denied Petitioner's rights of Freedom of Speech and Freedom of Association.

OPINIONS BELOW

The opinion of the Ninth District of Ohio Court of Appeals is reported as State v. Bilder (1994), 99 Ohio App. 3d 653 (Ohio App. 9 Dist.) and appears in Appendix A to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on December 30, 1994. A timely Appel to the Ohio Supreme Court was filed on February 13, 1995. The Ohio Supreme Court dismissed the Appeal on May 17, 1995, declining jurisdiction as not involving any substantial constitutional question and is set forth in Appendix B. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the United States Constitution is set forth in Appendix C.

Ohio Constitution, Article I, Section 11, Freedom of Speech, is set forth in Appendix D.

STATEMENT OF THE CASE

On or about the end of December, 1993, a Complaint was filed against Petitioner Rudolph Bilder alleging that on

or about December of 1993, in Summit County, Ohio, the Petitioner, by engaging in a pattern of conduct, knowingly caused Ron Smith to believe that the Petitioner would cause physical harm to him; or caused mental distress to Ron Smith. Ohio Rev. Code Section 2903.211, a first degree misdemeanor. (Akron City Code Section 135.09). (Stalking).

The Petitioner was arraigned and the case was duly set for trial on March 17, 1994. After a two- (2) day trial and on March 18, 1994, the jury returned a verdict of "Guilty." The trial Court immediately sentenced Petitioner to serve ninety (90) days in the Akron Correctional Facility, suspending sixty (60) of those days. Petitioner was ordered to perform one hundred (100) hours of public service and to pay a fine of One Hundred Dollars ($ 100.00) plus Court costs. Imposition of Petitioner's sentence was stayed upon his oral motion and indication that an appeal would be filed. On April 15, 1994, Petitioner filed his Notice of Appeal to the Ninth District Court of Appeals for Ohio claiming numerous assignments of error.

On December 30, 1994, the Ninth District Court of Appeals for Ohio affirmed Petitioner's conviction holding, in essence, that Petitioner's speech was not constitutionally protected, as the statute under which Petitioner was convicted reflected a legitimate state interest. An appropriate Appeal and Memorandum in Support of Jurisdiction was filed in the Ohio Supreme Court on February 13, 1995.

On May 17, 1995, the Supreme Court of Ohio declined jurisdiction to hear the case and dismissed the Appeal as not involving any substantial constitutional question.

Petitioner now seeks review by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this case for two primary reasons: First, the statute, in its application, prohibits speech which is protected by the United States and Ohio Constitutions. Second, the statute makes criminal actions out of mere utterances of speech incidental to passing by another person; accordingly, the statute is overbroad.

The statute under which Petitioner was convicted provides that: "No person, by engaging in a pattern of conduct, shall

. . . ." Akron City Code Section 135.09 (A). "Pattern of conduct" means two (2) or more <u>actions</u> or <u>incidents</u> . . . (emphasis added) Akron City Code Section 135.09(C)(1). It is clear that the statute contemplates actions or incidents -- both of which require some physical action on the part of the Petitioner. It is Petitioner's contention that nearly all the confrontations between Petitioner and Smith involved only verbal exchanges, without any threats and without any physical action/contact, and they all occurred in a public forum. Petitioner did no more than indulge himself in the use of his constitutional right of freedom of speech and expression. In essence, Petitioner called the prosecuting witness

names whenever their paths crossed.

At trial, it was ~~un~~controverted that all incidents took place in a public building or immediately outside a public building, the Summit County, Ohio, Courthouse. It was further testified to by the Deputy Sheriffs and Petitioner that the routine of Petitioner was to come to the Summit County Common Pleas Courthouse on a nearly daily basis to observe judicial proceedings therein.

There was not one (1) shred of evidence to even imply that Petitioner in any way sought out Smith. Petitioner and Smith simply were in the same public building and met by chance. The entrance to the offices where Smith worked was near to the entrance to the Courthouse and adjacent to the only elevators.

Although we do not know what factors were considered by the jury in convicting the Petitioner, the evidence presented by the State consisted of seven (7) or eight (8) name calling incidents plus two (2) incidents which involved some minor physical contact. Furthermore, the second of the only two (2) incidents which occurred in December, 1993, occurred while Petitioner was attempting to lodge a verbal complaint against Smith to Smith's supervisor.

Petitioner argues that he did nothing more than speak his mind, which is a constitutionally-protected right. Ohio Constitution, Article I, Section 11, Freedom of Speech, states:

> Every citizen may speak freely, write and publish

> his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press . . .

Petitioner recognizes that freedom of speech does have both its restrictions and responsibilities, however, it simply is not illegal (under the offense charged) to call someone names. Those instances testified to by the State's witnesses may have demonstrated that Petitioner used poor taste, but there was absolutely no evidence that he ever sought out Smith. Most of the testimony involved "words" passed between two (2) individuals passing in the hall. The fact that the language used or message conveyed did not appeal to Smith does not make it unprotected speech. Accordingly, the ordinance under which Petitioner was convicted must be declared as unconstitutional as applied to him in the case sub judice.

> The freedoms of speech and press are almost universally regarded as being essential to the very existence and perpetuity of free government. The right to freely express one's opinion is guaranteed by the Constitution of the United States and by the Constitution of the State of Ohio, both of

> which provide for freedom of speech and of the press. These are fundamental freedoms and are the pillars on which all others rest. Accordingly, these freedoms are given a broad scope.
>
> . . .
>
> Freedom of expression is not limited exclusively to words or speech. Expression may encompass certain forms of conduct illustrative of ideas for bringing about political or social changes desired by the people. The exercise of the vital right of free speech is not confined to effete or mild expression concerning unimportant issues. Freedom of speech may be practiced vigorously, and with conviction, in regard to controversial or unpopular issues.

Ohio Jur. 3d, Constitutional Law, Section 464.

Statutes which, by their application, seek to regulate spoken words have been previously stricken. The possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly

broad statutes (see Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

The application of the Akron ordinance to Petitioner denied him the right to express his opinion. If his language or name calling constitutes an actionable offense, it is a civil action, not a criminal action. However, it is doubtful that Petitioner's actions would even pass muster in a civil action.

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and, in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.
> See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49]

the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936).

Yeager v. Local Union 20 (1983), 6 Ohio St. 3d 369, 375.

In recent years, many cities and municipalities have enacted anti-stalking statutes and ordinances. However, as with many other statutes whose purpose is to prevent possible criminal activity, they often are applied to borderline cases for which they were not enacted. Akron City Code Section 135.09 is identical to Ohio Rev. Code Section 2903.211 and both were enacted in the Fall fo 1992. Presently, there are few cases, reported or unreported, which interpret the statutes. The few cases which have been litigated have established precedents which ignore the requirements of the statute itself, permit inappropriate "other acts" evidence and condone punishment for speech and expression. The statute itself is overbroad when applied to acts of speech and expression as in this case. A statute is overbroad if it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments" Akron v. Rowland (1993), 67 Ohio St. 3d, 374, 387, quoting Grayned v. Rochford (1972), 408 U.S. 104, 115, 33 L. Ed. 2d 222, 231.

The implications of the lower court's decision affects the daily lives of many people. Permitting prosecution for innocent acts of expression based upon subjective testimony of mental distress is outrageous. Individuals who have been

teased by another on two (2) occasions can prosecute, claiming that they suffered mental distress as a result of teasing. No expert tesimony is required to substantiate the claimed mental distress. No proof is required that the victim was sought out. Words become the equivalent of criminal conduct.

The menacing by stalking statute, at least as applied to Petitioner, is unconstitutional. It unduly restricts his freedoms of speech and expression which should not and cannot form the basis of a criminal offense. The courts previously have held that insults, indignities, threats, annoyances, petty oppressions or other trivialities cannot establish liability or a cause of action. Yeager v. Local Union 20, 6 Ohio St. 3d, 369, 375. That which is not even a civil wrong cannot be a criminal wrong.

Apart from the legal considerations, which makes this case one of public and great general interest, is the potential for abuse of the statute. If "actions or incidents" can consist of name calling and an individual can be prosecuted based solely upon subjective testimony of mental distress, there is virtually no proof required. The most significant potential problem is in the work place. Co-employees who routinely tease another, causing him to be distressed, can be prosecuted. This type of application cannot be tolerated in a society that guarantees freedom of speech.

Lastly, this case involves a substantial constitutional question. The ordinance, in its application, violates our First Amendment guarantee of Freedom

of Speech. If allowed to stand, its application makes criminal that which cannot even be prosecuted in a civil action. In the process, freedom of speech is curtailed and the First Amendment is eroded. "It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma, 413 U.S. 601, 611 (1973).

All determinations that have been filed heretofore on this case, and inclusive of the Ohio Supreme Court, fall into a category of miscarriage of justice. No crime was committed. This case has been consistently and wrongfully decided in favor of the State of Ohio. The truth and honest facts of the case were not what the prosecution presented. Their side is the only side of the matter that has been dealt with with emphasis. The prosecutring witness violently assaulted and battered Petitioner yelling "I'll kill you," and when realizing the seriousness of his actions, went to the City of Akron Prosecutor, who believed him, and charged Petitioner with stalking. After Petitioner's conviction, he was sentenced to thirty (30) days in jail, One Hundred Dollar ($ 100.00) fine and one hundred (100) hours of community service. During the trial, the Judge and jury lost its way and the Ninth District Court of Appeals overlooked or erred in considering the assignment of errors submitted.

This case was not stalking and there

should have been an acquittal at trial and/or a reversal by the Ninth District Court of Appeals as well as by the Supreme Court of Ohio. Petitioner is nearly seventy (70) years old, a World War II U.S. Navy veteran, and retired hospital laboratory medical technician. He is college educated, Catholic in his faith, and is known to many priests, pastors and a bishop as well as medical doctors through his employment. To pass the time since retirement, Petitioner attends Court sessions as a spectator in Akron, Cuyahoga Falls and Barberton, Ohio, and have become known as a "court watcher." It is through the latter that he came across Ron Smith, the prosecuting witness. Mr. Smith is a trained, experienced ex-police officer, and now a probation officer for the Court. He lied and wants the Court to believe that, although trained and experienced as a policeman, he would allow a seventy-(70) year-old man to put him in fear by calling him names. His falsehoods have dwindled Petitioner's retirement and pension monies because of attorney fees, filing fees, etc. There has been no justice in this case.

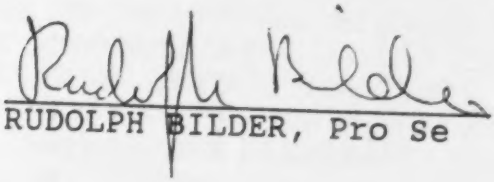
This Court should grant certiorari to hear this case and review the erroneous and dangerous decisions of the Courts below.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals and Ohio Supreme Court in this matter.

DATED: August 15, 1995

Respectfully submitted,



RUDOLPH BILDER, Pro Se

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OCTOBER TERM, 1994

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PROOF OF SERVICE

I, Rudolph Bilder, do swear or declare that on this date, August 14, 1995, pursuant to Supreme Court Rules 29.3 and 29.4, I have served my PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above document in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as follows:

Ms. Tracie Sims
Attorney for Respondent

City of Akron Law Department
206 Government Office Building
161 South High Street
Akron, OH 44308

RUDOLPH BILDER, Pro Se

Subscribed and Sworn To Before
Me this 11th day of September, 1995.

NOTARY PUBLIC in and for
said County and State.

SHARON E. MILLER
Notary Public, State of Ohio
My commission expires Oct. 29, 1997

EXHIBIT A

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
STATE OF OHIO)) Appellee)) v.)) RUDOLPH BILDER)) Appellant)	C.A. NO. 16754 APPEAL FROM JUDGMENT ENTERED IN THE AKRON MUNICIPAL COURT OF THE COUNTY OF SUMMIT, OHIO CASE NO. 93 CRB 14420

DECISION AND JOURNAL ENTRY

Dated: December 30, 1994

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam. Defendant Rudolph Bilder has appealed from his conviction of menacing by stalking. He has argued: (1) that the trial court received improper other acts evidence; (2) that the trial court incorrectly failed to instruct the jury regarding the definition of the phrase "closely related in time: as used in the ordinance pursuant to which he was prosecuted; (3) that the trial court incorrectly permitted references to his involvement in prior criminal activity; (4) that the ordinance pursuant to which he was prosecuted is unconstitutional; and (5) that the state failed to present sufficient evidence that he caused his

alleged victim to suffer mental distress to support the judgment against him. This Court affirms defendant's conviction because: (1) the trial court did not err by receiving evidence of other acts in which defendant had engaged; (2) the phrase "closely related in time" did not need to be defined for the jury; (3) most of the claimed references to defendant's involvement in prior criminal activity were, at best, obscure, and the trial court sustained defendant's objection to the only reference that could have come close to improperly influencing the jury; (4) Section 135.09 of the Akron City Code is not unconstitutional as applied in this case; and (5) there was sufficient evidence before the jury to support its conclusion that defendant's victim suffered mental distress.

I.

Defendant was accused of menacing Ronald Smith, a Summit County probation officer, in violation of Section 135.09 of the Akron City Code:

> [Defendant] at the City of Akron, Summit County, Ohio on the 22ND day of DECEMBER, 1993, DID knowingly engage in a pattern of conduct which caused * * * RONALD SMITH to believe that [defendant] would cause physical harm to, or caused mental distress to the said RONALD SMITH * * *.

He was tried before a jury in the Akron Municipal Court commencing March 17, 1994.

The state presented evidence that

defendant had harassed Mr. Smith several times between October, 1992 and December, 1993. The incidents allegedly occurred at or around the Summit County Courthouse, Mr. Smith's place of employment. Generally, defendant would call Mr. Smith derogatory names and make obscene gestures at him. Mr. Smith testified, however, that defendant's verbal harassment escalated into a physical confrontation on December 22, 1993:

> I was exiting the Courthouse and [defendant] was standing right inside of the entrance door. It's a very small confined space. If you're exiting and entering at the same time, you almost brush shoulders. * * * This is probably only the second time I had a real, real close encounter with [defendant]. Almost a face-to-face type of thing.
>
> I get right to the exit door. [Defendant] says, "Hey Shitty Smitty. That is your name isn't it? Shitty?" I turned to [him] and I said "Rudy, I don't want to have any conversation with you. You keep bothering me, I'm going to press charges against you."
>
> At that instant, I'm standing there and he strikes out at me and says, "Fuck you, Shitty." I go back and he strikes me in the chest. I have a file. I'm right handed. I have a file in my right hand. I'm partly against the door.

> When I go back I instantly swing grazing him on the chin. [Defendant] goes back against the counter. He says, "Is that all you got? You missed me, Shitty. Let's go outside."

Mr. Smith testified that he left the Courthouse after the confrontation and that defendant followed him while he walked toward his car.

Mr. Smith also testified that defendant confronted him at the probation office in the Courthouse six days later:

> I was walking within the Probation Department. Walking up to the front desk, which we often do to check our mail box and stuff. [Defendant] is standing there. I just looked over. He's standing in the doorway. He says, "How's your hand, Shitty?" I said "Rudy, I don't wish to have any conversation with you." His response is, "Conversation, hell. You don't know what a conversation is, asshole." By that time the secretary got out of her chair and walked around the counter and escorted him out of the Probation Department. Then I came out and made a police report.

The jury found defendant guilty, and the trial Court sentenced him to 90 days in jail, 60 days of which it suspended on the condition that he have no further con-

tact with Mr. Smith. He timely appealed to this Court.

II.

A.

Defendant's first assignment of error is that the trial court received improper other acts evidence. Specifically, he has asserted that he was "denied a fair trial in that testimony of events over a period of many months was presented for the jury's conside4ration, yet the offense was alleged to have occurred in December, 1993."

> Section 135.09(A) of the Akron City Code provides:
>
> No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

Section 135.09(C)(1) defines a pattern of conduct as:

> [T]wo or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

There was evidence before the jury from which it could find that defendant engaged in actions aimed at causing Mr. Smith mental distress on December 22, 1993 and December 28, 1993. The evidence of

those two incidents supplied the elements of the crime defendant was accused of committing. There was also evidence before the jury, however, regarding a number of other confrontations between defendant and Mr. Smith during the period between October, 1992 and December, 1993. Defendant's assignment of error is addressed to that evidence of other acts.

Rule 404(B) of the Ohio Rules of Evidence provides for admission of other acts evidence for a number of purposes, including showing motive or intent, while excluding such evidence when it is offered for the purpose of proving a person's character "in order to show that he acted in conformity therewith." Other acts evidence can be particularly useful in prosecutions for menacing by stalking because it can assist the jury in understanding that a defendant's otherwise innocent appearing acts, when put into the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress. For example, in State v. Woodgeard (Apr. 29, 1994), Fairfield App. No. 45-CA-SEP-1993, unreported, the Fifth District Court of Appals affirmed a judgment of a trial Court in a menacing by stalking case in which the pattern of conduct for which defendant was prosecuted was twice driving by his victim's home and driving in her neighborhood a third time. The Court of Appeals held that the trial Court did not err by receiving evidence that the defendant had previously assaulted the victim, had followed her, and had placed numerous harassing telephone calls to her. These past contacts between the defendant and his victim supplied the context from which it became clear that what otherwise appeared to be an innocent act, driving in the victim's neighborhoodm, was actually

knowingly causing the victim mental distress.

Despire the words used by defendant in his assignment of error, that he "was denied a fair trial in that testimony of events over a period of many months was presented for the jury's consideration, * * *," his argument in support of that assignment does not appear to be that such other acts evidence was not admissible. Rather, he appears to have argued that the jury may have been misled into convicting him based on the incidents that occurred prior to December, 1993 instead of doing so based only on the two incidents that occurred during that month.

Defendant has claimed that he requested the trial Court to provide the jury a limiting instruction regarding its consideration of the other acts evidence that was before it. He concedes, however, that no such request appears in the record. As the apppellant, defendant was required to provide this Court a transcript of the proceedings that occurred in the trial Court that is adequate for a determination of his assigned error. Bank One, N.A. v. Hill (Feb. 9, 1994), Wayne App. No. 2796, unreported, at 5. Accordingly, this Court must view defendant's argument as one that was not brought to the attention of the trial Court. In the absence of plain error, an appellate Court need not consider an error which a party complaining of the trial Court's judgment could have called, but did not call, to the trial Court's attention at a time when such error could have been avoided or corrected by the trial Court. State v. Williams (1977), 51 Ohio St. 2d 112, paragraph one of the syllabus, vacated in part on other grounds, (1978), 438 U.S. 911, 57 L.Ed. 2d 1156. The trial Court did not

commit plain error in not providing the limiting instruction defendant has asserted should have been provided. The trial Court properly instructed the jury that, before it could find defendant guilty, it had to find, beyond a reasonable doubt, that he had engaged in a pattern of conduct "on or about December of 1993" that knowingly caused Mr. Smith to believe that he would cause him physical harm or caused him mental distress. The absence of the limiting instruction that defendant has argued should have been provided does not present the type of exceptional circumstances that would cause this Court to conclude that defendant's conviction as a manifest miscarriage of justice. See State v. Long (1978), 53 Ohio St. 2d 91, paragraph three of the syllabus. Accordingly, defendant's first assignment of error is overruled.

B.

Defendant's second assignment of error is that the trial Court incorrectly failed to instruct the jury regarding the meaning of the phrase "closely related in time" as used in Section 135.09(C)(1). Defendant has argued that, without an instruction defining that phrase, the jury was free to apply a subjective standard to his alleged conduct. Such a subjective standard, according to defendant, would inevitably lead to inconsistent verdicts in similar cases.

The trial Court did not err by not instructing the jury regarding the meaning of the phrase "closely related in time." For one thing, defendant did not provide the trial Court a suggested definition for inclusion in its instructions. In addition, this Court has previously determined that "terms of common usage * * * do not

require elaboration to the jury." Akron v. Wendell (1990), 70 Ohio App. 3d 35, 42-43, citing State v. Riggins (1986), 35 Ohio App. 3d 1, 8. As has been noted by the Ohio Supreme Court, the inclusion of definitions in jury instructions should be limited:

> We emphatically remind trial courts that they should limit definitions where possible, to those definitions provided by the legislature in order to avoid unnecessary confusion and needless appellate challenges.

State v. Williams (1988), 38 Ohio St. 3d 345, 356, fn. 14, certiorari denied (1989), 489 U.S. 1040, 103 L. Ed. 2d 238. Neither Section 135.09 of the Akron City Code nor any other relevant provision included a definition of the phrase "closely related in time" because it is a phrase of common usage. The trial Court did not err by failing to include a definition of it in the instructions provided the jury.

Defendant has also argued that Section 135.09 of the Akron City Code is unconstitutionally vague because of its use of the phrase "closely related in time." He has conceded, however, that he failed to raise this issue before the trial Court. As noted previously, in the absence of plain error, an appellate Court need not consider an error which a party complaining of the trial Court's judgment could have called, but did not call, to the trial Court's attention at a time when such error could have been avoided or corrected by the trial Court. State v. Williams (1977), 51 Ohio St. 2d 112, para-

graph one of the syllabus, vacated in part on other grounds (1978), 438 U.S. 911, 57 L. Ed. 2d 1156. Accordingly, this Court declines to consider defendant's argument that Section 135.09 is unconstitutionally vague. Defendant's second assignment of error is overruled.

C.

Defendant's third assignment of error is that the trial Court incorrectly permitted references to his involvement in prior criminal activity. He has asserted that there were four such improper references, all during Mr. Smith's testimony. Three of those claimed references, if references to criminal activity at all, were so obscure that they could not possibly have prejudiced defendant. The trial Court sustained an objection to the fourth claimed reference and ordered it stricken, although it would not have been an error to have allowed it to stand.

The first claimed reference was as follows:

> Q: How long have you known [defendant]? When did you come to know him?
>
> A: I first became personally acquainted with him when I was working - I believe the year was around 1984 or '85. I was working
>
> [Defendant's attorney]: Objection, Your Honor. I believe the question has been answered.

[The Court]: Sustained.

Q: You (inaudible)

A: In 1984 or 1985.

Q: That was an Akron Police Officer, is that correct?

A: Correct.

The fact that Mr. Smith became acquainted with defendant during the time he was working as a police officer does not necessarily mean that defendant was engaged in criminal activity. Besides, defendant failed to object to this claimed reference to his criminal activity.

The second claimed reference to defendant's prior criminal activity was as follows:

Q: Did you ever have any altercations with [Defendant] as a Police Officer?

A: Yes, I have.

Again, altercations are not necessarily criminal activity. In addition, the fact that defendant and Mr. Smith had "altercations" during the time Mr. Smith was a police officer, a position from which he had retired during 1988, provided part of the context within which the jury needed to consider the two incidents that occurred during December, 1993 in order to determine whether defendant was knowingly causing Mr. Smith mental distress. Further, again, defendant failed to object to this claimed reference to his prior criminal activity.

The third claimed reference to defendant's prior criminal activity occurred during defendant's cross-examination of Mr. Smith:

> Q: Have you ever encountered [defendant] anywhere other than at the Courthouse or in the immediate area?
>
> A: What's your definition of the immediate area?
>
> Q: Within 2 or 3 blocks.
>
> A: Yes.
>
> Q: When would that have been?
>
> A: 1986, 1987 and 1988.

Again, just because Mr. Smith encountered defendant during the time he was a police officer does not mean defendant was engaged in criminal activity. Besides, defendant elicited this testimony and cannot now complain about it.

The fourth claimed reference was as follows:

> Q: Tell us about the first incident [after becoming a probation officer].
>
> A: First incident I believe was with Doug Elliot where we were exiting the Courthouse. [Defendant] approached me [and called me names].

> * * * Mr. Elliot said "Who is this guy? Where did he come from.?" Then I explained to Mr. Elliot that he seeks me out wherever I am and cusses me out because of a case where I testified with him in a criminal case -
>
> [Defendant's attorney]: Objection, Your Honor. Move to strike.
>
> The Court: Sustained. It is so stricken. The jury will disregard the last portion of the statement.

Because of Mr. Smith's use of the word "with" instead of "against," it is not clear that he was referring to a case in which defendant was the accused. Further, Mr. Smith's statement was stricken and the jury instructed to disregard it. Even if the reference had been a clear statement that Mr. Smith had testified against defendant in a criminal proceeding and the trial Court had allowed it to stand, it would not have constituted reversible error. Such evidence would properly provide part of the context within which defendant's December, 1993 conduct caused Mr. Smith to suffer mental distress. Defendant's third assignment of error is overruled.

D.

Defendant's fourth assignment of error is that Section 135.09 of the Akron City Code, as applied in this case, is unconstitutional because it infringes upon

his freedom of speech. Additionally, he has complained that his actions didn't meet the "pattern of conduct" requirement of the statute.

Defendant has, in essence, argued that Section 135.09 is unconstitutionally overbroad. He has asserted that the ordinance, as applied in this case, violates Article I, Section 11 of the Ohio Constitution because it prohibits the exchange of constitutionally protected speech. He has maintained that nearly all of his actions "involved only verbal name calling without any threats and without any physical action/contact," and were merely an exchange of words "between two individuals passing in the hall." Accordingly, he has contended that the statute is overbroad because it punishes the exercise of his constitutional rights.

"[T]he free speech guarantees afforded by the Ohio Constitution are no broader than the First Amendment * * *" to the United States Constitution. Eastwood Mall, Inc. v. Slanco (1994), 68 Ohio St. 3d 221, 222. Accordingly, cases interpreting the First Amendment provide the relevant analysis for interpretation of Section 11, Article I of the Ohio Constitution. Id., citing State ex. rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals (1992), 63 Ohio St. 3d 354, 362-363; Zacchini v. Scripps-Howard Broadcasting Co. (1978), 54 Ohio St. 2d 286, 288 (further citations omitted).

A statute is overbroad if it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Akron v. Rowland (1993), 67 Ohio St. 3d 374, 387, quoting Grayned v. Rockford (1972), 408 U.S. 104, 115, 33 L. Ed. 2d 222, 231. Thus, a "clear and

precise enactment may * * * be 'overbroad' if in its reach it prohibits constitutionally protected conduct." Id., quoting Grayned, 408 U.S. at 114, 33 L. Ed. 2d at 231. This principal is based upon a recognition that the "First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." Broadrick v. Oklahoma (1973), 413 U.S. 601, 611-12, 37 L. Ed. 2d 830, 839-40 (citations omitted).

The United States Supreme Court has indicated that it will sometimes strike an overbroad statute even if the activities of those challenging the statute are unprotected forms of speech:

> [A] decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the [defendant] has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar.

NAACP V. Button (1963), 371 U.S. 415, 432, 9 L. Ed. 2d 405, 418 (citations omitted).

Consequently, it has allowed "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." Broadrick, 413 U.S. at 612, 37 L. Ed. 2d at 840, quoting Dombrowski v. Pfister (1965), 380 U.S. 479, 486, 14 L. Ed. 2d 22.

This Court, however, does not need to consider whether Section 135.09 is facially overbroad. Despite the United States Supreme Court's broad statements concerning the application of the overbreadth doctrine, it has pursued a more limited analysis when considering challenged laws that regulate conduct that "falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constituionally unprotected conduct." Broadrick, 413 U.S. at 615, 37 L. Ed. 2d at 842. The Supreme Court has noted that there are times when criminal statutes that infringe upon some protected speech should not be held to be facially overbroad:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect - at best a prediction - cannot, with confidence, justify invlaidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to pro-

scribe.

Id. at 615, 37 L. Ed. 2d at 842. Section 135.09 is a criminal law aimed at prohibiting harmful conduct. The statute undoubtedly reflects a legitimate state interest.

This Court must etermine, however, whether Section 135.09 is unconstitutional as applied in this case. To accomplish this task, it must determine if defendant had a constitutionally protected right to engage in the type of activity he allegedly committed. If defendant did not have a constitutionally protected right to engage in those activities, then his argument that the statute, as applied in this case, was unconstitutionally overbroad must fail. Under the facts in this case, defendant did not have a constitutionally protected right to engage in the conduct that caused Mr. Smith mental distress.

The First Amendment generally prevents government from proscribing speech or expressive conduct because of disapproval of the ideas expressed. R.A.V. v. St. Paul (1992), _____ U.S. _____, 120 L. Ed. 2d 305, 317. Not all types of speech, however, are protected by the United States and Ohio Constitutions. "There are well-defined and narrowly limited classes of speech, the prevention of which does not raise any constitutional problem, including lewd and obscene, profane and libelous speech, and insulting or fighting wors which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace." State v. Presley, (1992), 81 Ohio App. 3d 721, 723-24 (citations omitted). The United States Supreme Court has noted that, from 1791 to the present, "our society, like other free but civilized

societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." R.A.V. v. St. Paul, _____ U.S. at _____, 120 L. Ed. 2d at 317, citing Chaplinsky v. New Hampshire (1942), 315 U.S. 568, 86 L. Ed. 1031. At least one Ohio appellate court has determined that it is not "within the protection of the First Amendment's guarantee of free speech to knowingly cause another to believe one will cause physical harm or mental distress to him or her by engaging in two or more actions or incidents closely related in time." State v. Benner, (Aug. 31, 1994), Hamilton Co. App. No. C-930400, unreported, at 1-2.

Additionally, defendant's conduct exceeded mere speech "in its purest form." Evidence was presented at trial that, on occasion, defendant would approach Mr. Smith in a confrontational manner with his "fists clenched." Further, the incidents of verbal harassment culminated in a physical confrontation during which, according to Mr. Smith, he was struck in the chest by defendant.

In regard to defendant's assertion that he did not engage in a "pattern of conduct," there was evidence of two confrontations during December, 1993. Those confrontations were "closely related in time," and, therefore, constituted a "pattern of conduct." Defendant's fourth assignment of error is overruled.

E.

Defendant's fifth assignment of error is that the state failed to present suffi-

cient evidence that he caused Mr. Smith to suffer mental distress to support the judgment against him. Primarily, he has argued that the prosecution was required to present expert testimony.

Expert testimony is not required to establish the existence of mental distress for purposes of Section 135.09 of the Akron City Code. Subsection (C)(2) of that section defines mental distress as "any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment." In an analogous situation, the Ohio Supreme Court has noted that expert testimony is not required to determine the existence of an emotional injury:

> [Expert] medical testimony can assist the judicial process in determining whether the emotional injury is indeed, serious * * *. However, lay witnesses who were acquainted with the plaintiff may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff after the accident has occurred. The jurors themselves can refer to their own experiences in order to determine whether, and to what extent, the defendant's conduct caused the serious emotional distress.

Paugh v. Hanks (1983), 6 Ohio St. 3d 72,

80 (citation omitted). Similarly, in this case, the jurors could have relied on their experiences and on the testimony presented by Mr. Smith to determine if, in fact, he suffered mental distress because of defendant's actions.

There was sufficient evidence presented for the jury to find beyond a reasonable doubt that Mr. Smith suffered mental distress. Mr. Smith testified that, although he did not go to a psychiatrist's office for treatment, he socialized with a psychiatrist on a regular basis and consulted him on several occasions concerning the incidents with defendant. Additionally, he stated that he was emotionally upset by defendant's conduct:

> Very frustrated. I'm angry. I guess you can say I'm at my wit's end. I don't -- I'm ready to explode. I'm having stomach problems. Work problems. I can't concentrate. I feel like I'm a prisoner in my own workplace. I complain to my Supervisor. I complain to the Court Executive Officer. I'm informing everybody of what's going on. I don't know where to turn. I don't know what else to do.

Further, Mr. Smith's sueprvisor testified that Mr. Smith was visibly shaken by the physical confrontation that occurred on December 22, 1993:

> Ron was visibly shaken.

> He was angry. I even noticed that, during the course of the next several days that followed when he saw probationers, he was a little more terse with them than he normally was. I'm not saying this was a direct result; but it wasn't the same Ron Smith that generally handled problems.
>
> We discussed it and he did indicate that this incident did bother him. We were trying to basically try to put the incident behind and concentrate more on the work he was dealing with.
>
> Over the next several weeks, his attitude seemed to change and he was back to himself again.

Inasmuch as there was sufficient evidence before the jury that Mr. Smith suffered mental distress, defendant's fifth assignment of error is overruled.

III.

Defendant's assignment of error are overruled. The judgment of the trial Court is affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue

out of this Court, directing the County of Summit, Akron Municipal Court, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgmnt, and it shall be file stamped by the Clerk of the Court of Appeals, at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to Appellant.

Exceptions.

s/ William R. Baird
WILLIAM R. BAIRD
FOR THE COURT

BAIRD, P. J.
COOK, J.
DICKINSON, J.
CONCUR

APPEARANCES;

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EXHIBIT B

THE SUPREME COURT OF OHIO

1995 TERM

To wit: May 17, 1995

State of Ohio, :
Appellee : Case No. 95-336

v. : E N T R Y

Rudolph Bilder,:
Appellant :

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $ 40.00, paid by Edward A. Dark, Esq.

(Summit County Court of Appeals; No. 16754)

s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

EXHIBIT C

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EXHIBIT D

OHIO CONSTITUTION
ARTICLE I, SECTION 11, FREEDOM
OF SPEECH, STATES:

Every citizen may speak freely, write and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press . . .

EXHIBIT E

AKRON CITY CODE 135.09

Menacing By Stalking

(A) No person by engaging in a pattern of conduct shall knowingly cause another to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

(B) Whoever violates this section is guilty of menacing by stalking, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section involving the same person who is the victim of the current offense, menacing by stalking is a felony of the fourth degree and shall be prosecuted under appropriate state law.

(C) As used in this section:

(1) "PATTERN OF CONDUCT" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

(2) "MENTAL DISTRESS" means any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment.

(Ord. 727-1992, passed 10-19-92)